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No.

In the Supreme Court of the United States

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

v.

MALLARD BAY DRILLING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessels" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 212 F.3d 898. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 8a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. A petition for rehearing was denied on August 8, 2000 (App., *infra*, 66a-67a). On October 27, 2000, Justice Scalia extended the time within which to

file a petition for a writ of certiorari to and including December 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), provides, in relevant part:

> Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

STATEMENT

1. a. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Each employer covered by the Act has a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Each employer must also comply with applicable occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C. 654(a)(2). The Secretary has delegated her authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). See 65 Fed. Reg. 50,017 (2000).

The OSH Act applies to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands." 29 U.S.C. 653(a).

When the Act was passed, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular fields, such as transportation and mining. To avoid duplication of effort, Congress provided in Section 4(b)(1) of the Act that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

OSHA regulations explain that:

> Section 4(b)(1) of the Act provides that the statute shall be inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions. Therefore, a person may be considered an employer covered by the Act, and yet standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority.

29 C.F.R. 1975.1(b). The regulations further explain that "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c).

b. The United States Coast Guard "administer[s] laws and promulgate[s] and enforce[s] regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not

specifically delegated by law to some other executive department." 14 U.S.C. 2. The extent of the Coast Guard's statutory authority over a vessel depends in large part on whether the vessel is "inspected" or "uninspected." See generally 46 U.S.C. 2101 *et seq.*, Subtit. II (vessels and seamen). "Inspected" vessels, listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998), include, for example, freight vessels, passenger vessels, seagoing motor vessels, tank vessels and certain types of barges. See also 46 U.S.C. 2101 (1994 & Supp. IV 1998) (definitions of different vessel types). "Uninspected vessels" are vessels not subject to inspection under Section 3301 that are not recreational vessels. 46 U.S.C. 2101(43).

"[T]o secure the safety of individuals and property on board" inspected vessels, the Secretary of Transportation has comprehensive rulemaking authority over those vessels, including their design, construction, alteration, repair, and operation. 46 U.S.C. 3306 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority on behalf of the Secretary by issuing comprehensive regulations. See generally 46 C.F.R. Ch. I; 49 U.S.C. 108(b) (Commandant of Coast Guard shall exercise powers delegated by Secretary of Transportation); 49 C.F.R. 1.46(b) (delegating authority to the Commandant). In contrast to its broad authority over inspected vessels, the Coast Guard's statutory authority to issue regulations for uninspected vessels is limited to specific topics, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. 46 U.S.C. 4102 (1994 & Supp. IV 1998). Coast Guard regulations therefore cover only a limited range of health and safety hazards on only certain uninspected vessels. See 46 C.F.R. Pts. 24-26. The Coast Guard has not

regulated hazards related to oil drilling operations on uninspected vessels.[1]

In light of those statutory and regulatory provisions, OSHA and the Coast Guard have entered into a memorandum of understanding (MOU) that clarifies the division of authority over working conditions on vessels. 48 Fed. Reg. 11,365 (1983) (*reprinted in* App., *infra*, 62a-65a). The MOU explains that the Coast Guard generally has exclusive authority over the working conditions of seamen aboard inspected vessels. App., *infra*, 63a. The MOU specifically states that it does not apply to uninspected vessels. *Id.* at 62a. OSHA generally exercises authority over such vessels unless a Coast Guard regulation applies to the specific working condition at issue. See OSHA Instruction CPL 2-1.20(R) at 14 (Nov. 8, 1996).

2. a. Respondent Mallard Bay Drilling, Inc., conducts oil and gas drilling operations. App., *infra*, 10a. On June 16, 1997, four of respondent's employees were killed and two others seriously injured in an explosion on a drilling barge located on Little Bayou Pigeon, a navigable waterway within the State of Louisiana. *Id.* at 2a. The drilling barge was classified by the Coast Guard as an uninspected vessel. *Id.* at 6a, 27a. Near the end of the drilling operation, the well blew out. *Id.* at 11a. The off-duty crew evacuated, but the on-duty crew stayed aboard in an unsuccessful attempt to regain control of the well. *Id.* at 23a. Thirty to forty minutes later, the explosion occurred. *Id.* at 32a.

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[1] The Coast Guard is also authorized to require reporting and to conduct investigations of marine casualties involving both inspected and uninspected vessels. 46 U.S.C. 6101-6104, 6301-6308 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority. See 46 C.F.R. Pt. 4.

The Coast Guard conducted a marine casualty investigation of the incident. See note 1, *supra*. The Coast Guard determined that explosive concentrations of natural gas had spread throughout the barge as a result of the blowout. App., *infra*, 32a. It found that the explosion most likely originated in the pump room, where a motor was operating that could have produced sparks to ignite the natural gas. *Id.* at 34a-35a. The Coast Guard concluded that respondent had not issued any specific directions regarding blowout control; that respondent's supervisors had not followed respondent's existing emergency procedures; and that they had not recognized the hazard of explosive gas accumulations on the rig and had not ordered the evacuation of on-duty personnel. *Id.* at 48a-50a. Because the Coast Guard lacked regulations governing those matters, it took no enforcement action and referred the matter to OSHA. *Id.* at 12a, 24a-25a.

Based on the report and other information from the Coast Guard, OSHA cited respondent for three violations of the OSH Act. App., *infra*, 2a. OSHA alleged that respondent had violated the Act's general duty clause, 29 U.S.C. 654(a), by failing to evacuate employees in a timely manner after the well blowout. App., *infra*, 9a. OSHA also alleged that respondent had violated particular OSHA standards by failing to develop and to implement an emergency response plan, as required by 29 C.F.R. 1910.120(q)(1), and by failing to train employees in emergency response, as required by 29 C.F.R. 1910.120(q)(6). App., *infra*, 9a.

b. Respondent did not contest the merits of the citation but argued before the Occupational Safety and Health Review Commission (Commission) that respondent was not subject to the OSH Act for two reasons. First, respondent contended that the drilling barge was

not a "workplace in a State" under 29 U.S.C. 653(a); and, second, respondent argued that the Coast Guard regulatory scheme rendered the OSH Act inapplicable under 29 U.S.C. 653(b)(1). App., *infra*, 2a.

The administrative law judge (ALJ) affirmed the citation. App., *infra*, 8a-19a. The ALJ held that the barge was a "workplace in a State" because it was located within the territorial boundaries of Louisiana. *Id.* at 12a-13a. With respect to preemption of OSHA authority under 29 U.S.C. 653(b)(1), the ALJ held that OSHA jurisdiction is preempted only as to those working conditions actually covered by another agency's regulations. App., *infra*, 14a-15a. Because respondent made no showing that any Coast Guard regulations address evacuation and emergency response to hazardous substance releases on uninspected vessels, *id.* at 15a, 16a, the ALJ concluded that the Coast Guard had not exercised authority to regulate the working conditions at issue and that OSHA jurisdiction was therefore not preempted under 29 U.S.C. 653(b)(1). App., *infra*, 18a. The Commission declined review, and the ALJ decision became final agency action. *Id.* at 20a-21a (citing 29 U.S.C. 661(j)).

c. Respondent sought review of the Commission's decision in the United States Court of Appeals for the Fifth Circuit, which reversed. App., *infra*, 1a-7a. The court of appeals held that OSHA lacks authority to regulate the working conditions of respondent's employees under 29 U.S.C. 653(b)(1), App., *infra*, 3a, 7a, and therefore the court declined to address respondent's contention that the barge was not a "workplace in a State" within the meaning of 29 U.S.C. 653(a), App., *infra*, 7a.

The court noted that, under Fifth Circuit precedent, "OSHA regulations do not apply to *working conditions*

of *seamen* on *vessels* in navigation" because "the Coast Guard has exclusive authority over the working conditions of seamen." App., *infra*, 3a-4a (citing *Donovan* v. *Texaco Inc.*, 720 F.2d 825, 826 (5th Cir. 1983), and *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120, 1121 (5th Cir. 1980)). The court rejected OSHA's contention that those cases were distinguishable because they involved inspected, rather than uninspected, vessels. App., *infra*, 4a-6a. The court found "no indication from *Clary* that the barge in that case was inspected," and the court emphasized that "the broad language of *Clary* does not turn on any such distinction." *Id.* at 5a.[2] The court noted that the Coast Guard is expressly authorized by 46 U.S.C. 4102 (1994 & Supp. IV 1998) to issue certain safety regulations for uninspected vessels and that the Coast Guard has exercised that authority. App., *infra*, 5a-6a (citing 46 C.F.R. 25.01 *et seq.* and 46 C.F.R. 26.01 *et seq.*). The court of appeals therefore reaffirmed its conclusion in *Texaco* that "the Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from OSHA] for seamen serving on vessels operating on navigable waters." *Id.* at 6a (quoting *Texaco*, 720 F.2d at 826).[3]

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[2] In fact, the vessel in *Clary* was a mobile offshore drilling unit operating on the outer continental shelf. *Clary* v. *Ocean Drilling & Exploration Co.*, 429 F. Supp. 905, 906 (W.D. La. 1977), aff'd, 609 F.2d 1120, 1122 (5th Cir. 1980). As such, it was a "seagoing barge[]" subject to inspection under 46 U.S.C. 395 (1976), the predecessor to 46 U.S.C. 3301(6).

[3] *Texaco* also involved a vessel (an oil tanker) subject to Coast Guard inspection. See *Donovan* v. *Texaco, Inc.*, 535 F. Supp. 641, 642 (E.D. Tex. 1982), aff'd, 720 F.2d 825 (5th Cir. 1983).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that the Occupational Safety and Health Act does not apply to the working conditions of seamen aboard uninspected vessels squarely conflicts with the holdings of three other courts of appeals. More generally, the decision departs from the well-established consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), does not confer an industry-wide exception to the Act's coverage based on limited regulation of employees in that industry by another agency. The court of appeals' erroneous interpretation of Section 4(b)(1) is inconsistent with its text, the history surrounding its enactment, its long-standing interpretation by the Secretary, and the purpose of the OSH Act. Finally, the decision leaves thousands of crew members on uninspected vessels within the jurisdiction of the Fifth Circuit without protection from serious health and safety hazards. This Court's review is therefore warranted.

1. In holding that the OSH Act does not apply to the working conditions of employees on uninspected vessels, the Fifth Circuit has created a conflict with the decisions of the three other courts of appeals that have addressed the same question. The Second, Ninth, and Eleventh Circuits have each upheld OSHA regulation of working conditions on uninspected vessels. See *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1244-1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1531 (11th Cir.), cert. denied, 479 U.S. 883 (1986); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

In *Red Star*, the Second Circuit held that OSHA could regulate noise aboard an uninspected vessel because the noise was a working condition that was not regulated by the Coast Guard. 739 F.2d at 778-780. The court explained that "the Coast Guard's regulation of uninspected vessels is limited to only a few areas," and it is therefore not "exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels." *Id.* at 780. "Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act," the court held, "OSHA may regulate noise hazards aboard uninspected vessels." *Ibid.* Similarly, in *Norfolk Dredging*, the Eleventh Circuit held that "the Coast Guard's regulation of safety aboard uninspected vessels is so circumscribed that it does not preempt OSHA's jurisdiction over crane safety aboard uninspected vessels." 783 F.2d at 1531. The court explained that, under Section 4(b)(1), OSHA jurisdiction is displaced only when another agency "either promulgate[s] regulations governing the working condition at issue, or articulate[s] a policy that the condition not be regulated." *Id.* at 1530. Finally, in *Tidewater Pacific*, the Ninth Circuit "agree[d] with the Secretary, the Commission, and the Second and Eleventh Circuits that the Coast Guard regulation of uninspected vessels does not preempt [OSHA] jurisdiction" (160 F.3d at 1245) in a case in which the "Coast Guard has not issued specific regulations governing the subjects of the [OSH Act] citation" (*id.* at 1243).

Those decisions are applications of the more general understanding that Section 4(b)(1) does not authorize exemptions of entire industries from OSH Act coverage based on limited regulation by another agency. That view is shared not only by the Courts of Appeals for the

Second, Ninth, and Eleventh Circuits but also by the Courts of Appeals for the District of Columbia and Fourth Circuits. See *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1053-1054 (D.C. Cir. 1976) (per curiam); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976). As the Second Circuit has explained, those "decisions teach that section 4(b)(1) was not intended to create industry-wide exemptions based on isolated or narrow exercises of statutory authority." *Red Star*, 739 F.2d at 778.[4]

Fifteen years ago, the government opposed this Court's review in *Red Star* and *Norfolk Dredging* because there was not then a square conflict in the circuits regarding OSHA jurisdiction over uninspected vessels. See 86-28 Br. in Opp. at 10-11, 13 in *Norfolk Dredging Co.* v. *Secretary of Labor*, *supra*; 84-590 Br. in Opp. at 10-11 in *Red Star Marine Servs., Inc.* v. *Donovan*, *supra*. At that time, the Fifth Circuit had already decided *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), and *Donovan* v. *Texaco Inc.*, 720 F.2d 825, 826 (1983), on which the court of appeals relied in this case. The Second and Eleventh Circuits had, however, found that the facts of those cases were distinguishable. See *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778-779. Moreover, because *Clary* and *Texaco* involved inspected vessels (see notes 2 & 3, *supra*), the government believed that those decisions spoke only to OSHA authority over working conditions

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[4] Indeed, the Fifth Circuit itself espoused the same view nearly a quarter century ago in a case concerning the railway industry. See *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 390 (1976), cert. denied, 434 U.S. 874 (1977).

on inspected vessels and did not address OSHA authority concerning uninspected vessels. See App., *infra*., 4a-5a. The Fifth Circuit, however, has now rejected any distinction of those cases based on the fact that they involved inspected vessels and has held that OSHA lacks authority over all working conditions of seamen on all vessels in navigation, including uninspected vessels. See *id.* at 3a-5a; see also *id.* at 66a-67a (denying petition for rehearing en banc). As a result, it is now appropriate for this Court to resolve the conflict created by the Fifth Circuit's decision.

2. The Fifth Circuit's decision is incorrect. The court's holding that OSHA lacks authority over all working conditions of seamen on all vessels in navigation, including uninspected vessels, rests on an interpretation of Section 4(b)(1) that is inconsistent with its text, the history surrounding its enactment, the Secretary of Labor's long-standing interpretation of the Section, and the purpose of the OSH Act. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the OSH Act is displaced when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. See, *e.g.*, *Norfolk Dredging*, 783 F.2d at 1530.[5] Because

[5] Such displacement can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient. Thus, as explained in the MOU between the Coast Guard and OSHA, the Coast Guard's exercise of its authority with respect to inspected vessels has displaced OSH Act coverage because the Coast Guard has promulgated "extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations." App., *infra*, 63a.

the Coast Guard has neither regulated the working conditions at issue here nor articulated a policy that they should not be regulated, the OSH Act continues to apply.

a. Section 4(b)(1) of the OSH Act provides that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As all the courts of appeals (including the Fifth Circuit) agree, that language expressly provides that OSH Act coverage is displaced only when another agency actually has "exercise[d]" its statutory authority to regulate occupational safety and health.[6] Possession of statutory authority is necessary but not sufficient to oust OSHA jurisdiction. The other agency must also "exercise" that authority by prescribing or enforcing regulations or by articulating a policy that regulation is not warranted. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *Norfolk Dredging*, 783 F.2d at 1530; *Southern Pac. Transp. Co.*

[6] See App., *infra*, 6a; *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *Norfolk Dredging*, 783 F.2d at 1530; *Red Star*, 739 F.2d at 778; *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 915 (3d Cir. 1980); *Southern Ry.*, 539 F.2d at 336-337; *Southern Pac.*, 539 F.2d at 389.

v. *Usery*, 539 F.2d 386, 391-392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).[7]

The text of Section 4(b)(1) also makes clear that a federal agency's exercise of authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. See *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778; *Baltimore & Ohio R.R.*, 548 F.2d at 1053-1054; *Southern Ry.*, 539 F.2d at 338; see also *Southern Pac.*, 539 F.2d at 389-390. By its terms, the text limits preemption to "*working conditions* of employees with respect to *which*" other federal agencies exercise authority. 29 U.S.C. 653(b)(1) (emphasis added). If Congress had intended to create industry-wide exceptions to OSH Act coverage, Congress could have provided that the Act would not apply to "industries in which" other agencies regulate occupational

[7] The legislative history is equally clear on this point. Several bills under consideration would have precluded OSH Act enforcement whenever another agency "has" statutory authority. See S. 2788, 91st Cong., 1st Sess. § 15, at 32 (1969); H.R. 843, 91st Cong., 1st Sess. § 13, at 22 (1969); H.R. 4294, 91st Cong., 1st Sess. § 13, at 13 (1969); H.R. 13373, 91st Cong., 1st Sess. § 15, at 32 (1969), *reprinted in* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 62, 620, 671, 710 (Comm. Print 1971) (*Leg. Hist.*). The versions reported in both the House and Senate, see S. 2193, 91st Cong., 2d Sess. (1970), as reported, § 4(b)(1) (*Leg. Hist.* 237); H.R. 16785, 91st Cong., 2d Sess. (1970), as reported, § 22(b) (*Leg. Hist.* 975), as well as the text that was ultimately enacted, however, precluded OSH Act enforcement only when another agency "exercises" such authority. That point was also emphasized in a colloquy on the House floor. See *Southern Ry.*, 539 F.2d at 337 (quoting *Leg. Hist.* 1019); 116 Cong. Rec. 38,381 (1970).

safety and health. Or Congress could have displaced OSH Act coverage of "working conditions of employees with respect to *whom*" other agencies exercise such authority. But Congress chose not to do so.

The bill initially passed by the House of Representatives did in fact provide for preemption of "working conditions of employees with respect to whom" other agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. See H.R. 16785, 91st Cong., 2d Sess. § 25(b) (1970), *reprinted in* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 1109 (Comm. Print 1971) (*Leg. Hist.*). Congress, however, did not adopt the language in the House bill; instead Congress chose the language in the Senate bill, which used "which" instead of "whom." See S. 2193, 91st Cong., 2d Sess. § 4(b)(1), at 5 (1970) (*Leg. Hist.* 533). As the Senate Report explained, that language limited preemption to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added) (*Leg. Hist.* 162). The Conference Committee recognized the difference in the language between the House and Senate versions and chose the Senate language. See H.R. Conf. Rep. No. 1765, 91st Cong., 2d Sess. 32-33 (1970) (*Leg. Hist.* 1185-1186). Thus, "consideration of the way in which Congress arrived at the statutory language," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974), confirms that exemptions from OSH Act coverage under Section 4(b)(1) depend on whether another federal agency has exercised statutory authority with respect to the "particular working conditions" at issue. S. Rep. No. 1282, *supra*, at 22.

That understanding of Section 4(b)(1) is also reflected in long-standing OSHA regulations. See 29 C.F.R. 1975.1(b) (because the Act is "inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions," "standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority"); 29 C.F.R. 1975.3(c) ("Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection."). The Secretary of Labor also set forth that interpretation of the Act in 1980 in a report to Congress concerning coordination between the OSH Act and other federal laws. App., *infra*, 56a, 57a ("industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards"). And that interpretation is reflected in three decades of citations for OSH Act violations that have been issued to employers operating in industries regulated in part by other federal agencies, as illustrated by the court of appeals decisions discussed above (see pp. 13-14, *supra*). See *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) (courts must defer to reasonable regulatory interpretations embodied in OSHA citations).

To reject that long-standing interpretation and instead to read Section 4(b)(1) as creating industry-wide exemptions from OSH Act coverage based on limited exercises of regulatory authority by other federal agencies not only is inconsistent with the statutory language and drafting history but also would undermine

the express purpose of the Act. As Congress explained in the text of the Act itself, the Act's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). That purpose would be frustrated if another federal agency's limited regulation of a few working conditions of some employees in a particular industry displaced OSH Act coverage over all working conditions of all employees in that industry. See *Red Star*, 739 F.2d at 780; *Baltimore & Ohio R.R.*, 548 F.2d at 1054; *Southern Ry.*, 539 F.2d at 338.

b. The court of appeals therefore erred in holding that there is "an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters," App., *infra*, 6a, including seamen serving on uninspected vessels, based on the Coast Guard's regulation of some of their working conditions on certain vessels. Instead, as we have explained, the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety or health standards or has articulated a policy that the working conditions not be regulated.

If the court of appeals had conducted that inquiry in this case, it would have concluded that Coast Guard action has not displaced the OSH Act. The Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard *inspected* vessels, and its comprehensive regulation of those working conditions has displaced OSH Act coverage of the working conditions of seamen on those vessels. See p. 4 & note 5, *supra*; App., *infra*., 63a. But the vessel at issue in this case is an *uninspected* vessel. See *id.* at 6a, 27a. The Coast Guard has authority to

regulate and has regulated only a few working conditions on uninspected vessels. See pp. 4-5, *supra* (discussing 46 U.S.C. 4102 (1994 & Supp. IV 1998) and 46 C.F.R. Pts. 24-26); note 8, *infra*. In addition, the Coast Guard has not articulated, and has no statutory authority to articulate, a policy that other working conditions on uninspected vessels should be free from regulation.

The working conditions at issue in this case are the conditions faced by employees on an uninspected vessel engaged in inland oil drilling operations—in particular, the risk of explosion caused by the presence of natural gas.[8] Because the Coast Guard has not regulated (and

[8] Although the OSH Act does not define "working conditions," the Secretary has long taken the view that the term means particular hazards encountered by an employee in the course of his or her job activities. See, *e.g.*, *Southern Ry.*, 539 F.2d at 339 (describing Secretary's interpretation); App., *infra*, 56a, 57a (equating working conditions as used in Section 4(b)(1) with "particular hazards"). See also *Corning Glass Works*, 417 U.S. at 201-202 (technical meaning of "working conditions" in the language of industrial relations is a worker's "surroundings"—"the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency"—and "hazards"—"physical hazards regularly encountered, their frequency, and the severity of injury they can cause"). Although some courts of appeals have adopted that definition of "working conditions," see *Red Star*, 739 F.2d at 778-780 (2d Cir.); *Norfolk Dredging*, 783 F.2d at 1530-1531 (11th Cir.); *PBR, Inc.*, 643 F.2d at 896 (1st Cir.), others have defined "working conditions" somewhat more broadly as "the environmental area in which an employee customarily goes about his daily tasks," *Southern Ry.*, 539 F.2d at 339 (4th Cir.); *Columbia Gas*, 636 F.2d at 916 (3d Cir.).

Resolution of that disagreement is not, however, necessary to resolve the issue presented in this case. The Coast Guard neither regulates the particular hazard of explosion caused by the presence of natural gas on an uninspected drilling rig nor otherwise

indeed could not regulate) those working conditions, it has not exercised any authority so as to displace OSH Act coverage of them. The court of appeals erred in concluding to the contrary.

3. This Court should correct the erroneous decision of the court of appeals not only because that decision has created a conflict among the federal courts of appeals (see pp. 9-12, *supra*), but also because it puts at risk the safety and health of employees on thousands of uninspected vessels within the jurisdiction of the Fifth Circuit. According to data maintained by the Coast Guard, approximately 68,000 vessels nationwide—including barges, fishing vessels, tugboats, towing vessels, and other commercial vessels—are classified as "documented" but not "inspected."[9] Those vessels are

regulates uninspected drilling barges so pervasively as to oust OSHA from enforcing its regulations in the affected "environmental area" on the vessel. As we have explained at pp. 4-5, *supra*, the Coast Guard's statutory authority to regulate uninspected vessels is limited to specific subjects, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. 46 U.S.C. 4102 (1994 & Supp. IV 1998). As a result, Coast Guard regulations for uninspected vessels cover only a very limited range of health and safety hazards and do not address any hazards relating to oil drilling operations. See 46 C.F.R. Pts. 24-26. Thus, even under "the Third and Fourth Circuits' environmental definition, it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt the Secretary's jurisdiction as to any particular portion of such vessels nor as to such vessels in whole." *Tidewater Pac.*, 160 F.3d at 1245-1246.

[9] To be eligible for documentation, a vessel must be at least five net tons and meet certain other statutory requirements. See 46 U.S.C. 2101(10) (definition); 12102 (1994 & Supp. IV 1998) (requirements). To be subject to inspection, a vessel must fall into one of the categories listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998). Some vessels, such as fishing vessels smaller than five net tons, are

now subject to OSHA regulation everywhere except within the Fifth Circuit. Although the Coast Guard does not maintain data on a State-by-State basis, OSHA and the Coast Guard estimate that the decision below will leave the crews of several thousand uninspected vessels in the Fifth Circuit with no statutory protection from serious threats to their occupational safety and health, except for a few Coast Guard rules directed to a narrow range of hazards on only some vessels. According to Coast Guard marine casualty reporting records, an average of 100 deaths and 600 injuries occur every year on uninspected vessels nationwide, including more than two dozen deaths and 100 injuries each year within the Fifth Circuit.[10] In addition, if the Fifth Circuit were to extend the rationale of its decision to permit industry-wide exemptions in other fields, its decision could affect employees in many other large industries, such as railroad and airline employees.

Permitting the court of appeals' decision to stand would also interfere with long-standing, settled decisions regarding the lawful and most effective division of

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neither inspected nor documented by the Coast Guard. As a result, the Coast Guard data understate the number of uninspected vessels.

[10] The Coast Guard defines a reportable injury as one "that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties." 46 C.F.R. 4.05-1(a)(6). The numbers included in the text are based on Coast Guard records for fiscal years 1996 through 2000. Not all marine casualties occur in circumstances that would potentially subject the vessel to OSH Act coverage. For example, if an accident occurs while a vessel is on the high seas, it is generally beyond the geographical scope of the OSH Act. See 29 U.S.C. 653(a).

safety and health regulatory responsibilities between the Departments of Transportation and Labor. With the consent and active cooperation of the Coast Guard, OSHA historically has enforced the OSH Act nationwide with respect to working conditions of employees on uninspected vessels (except in the rare case in which the Coast Guard has a regulation applicable to uninspected vessels that addresses the same occupational safety or health hazard). OSHA inspects such vessels in response to employee complaints, fatalities, and referrals, and OSHA inspectors often accompany Coast Guard personnel responding to marine casualties. Because the Coast Guard lacks statutory authority to promulgate and enforce general occupational safety and health standards for uninspected vessels, the Fifth Circuit's decision will leave thousands of employees unprotected from risks of death and serious injury, many of which (like the well blowout in this case) are not even specifically maritime in nature.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60124

MALLARD BAY DRILLING, INC., PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

June 2, 2000

Before: POLITZ and DAVIS, Circuit Judges, and RESTANI,* Judge.

W. EUGENE DAVIS, Circuit Judge:

Mallard Bay Drilling, Inc. ("Mallard") appeals the order of the Occupational Safety and Health Review Commission affirming a citation issued against it by the Occupational Safety and Health Administration ("OSHA"). The order affirmed the decision of the Administrative Law Judge, which found that Mallard's drilling barge—the MR. BELDON—was a "workplace" within the meaning of the Occupational Safety and

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* Judge of the U.S. Court of International Trade, sitting by designation.

Health Act ("OSH Act")[1] and that OSHA's jurisdiction was not preempted by the Coast Guard's regulatory authority over vessels. For the reasons that follow, we reverse.

I.

On June 16, 1997, four Mallard employees were killed and two others seriously injured in an explosion on the MR. BELDON, a Mallard drilling barge. On that date, the MR. BELDON was drilling an oil well on Little Bayou Pigeon, a navigable waterway within the territorial waters of Louisiana. The explosion occurred while crew members tried to regain control of the well after a blow out. The Coast Guard took the lead role in investigating the explosion. Based on the information collected by the Coast Guard, OSHA issued a citation against Mallard charging three violations of the OSH Act. Mallard did not challenge the merits of the allegations; rather, it asserted that OSHA lacked authority to regulate working conditions aboard the MR. BELDON. It also argued that the MR. BELDON was not a "workplace" within the meaning of Section 4(a) of the OSH Act.[2]

The ALJ affirmed the citation, finding that the MR. BELDON was a "workplace," that Mallard's employees were not seamen, and that OSHA's jurisdiction was not preempted by the Coast Guard's regulatory authority over vessels. Mallard then filed a Petition for Discretionary Review with the Occupational Safety and Health Review Commission, which was denied. Mallard now appeals.

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[1] 29 U.S.C. § 651 *et seq.*

[2] 29 U.S.C. § 653(a).

II.

Mallard contends that the United States Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen aboard vessels such as the MR. BELDON, thus precluding OSHA's regulation under Section 4(b)(1) of the OSH Act.[3] As our discussion below demonstrates, precedents from this Court compel us to agree.

By its own terms, the OSH Act does not apply to "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[4] Under 14 U.S.C. § 2, the Coast Guard "shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ."

It is uncontested that the Coast Guard had jurisdiction to investigate the marine casualty in this case, pursuant to 46 U.S.C. § 6301. The dispute concerns whether the Coast Guard's jurisdiction is exclusive. Our case law is controlling on this point. Pursuant to the statutory grant of authority recited above, the Coast Guard has exclusive authority over the working conditions of seamen. *See Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). "OSHA regulations do not apply to *working conditions*

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[3] 29 U.S.C. § 653(b)(1).

[4] 29 U.S.C. § 653(b)(1).

of *seamen* on *vessels* in navigation." *Donovan*, 720 F.2d at 826, 827 (emphasis added); *see also Clary*, 609 F.2d at 1121.

As in *Clary*, the "vessel" in this case is a drilling barge. The employees working on the MR. BELDON are "seamen" under our case law. *See Colomb v. Texaco, Inc.*, 736 F.2d 218 (5th Cir. 1984); *Producers Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966). The safety procedures at issue in this case relate to "working conditions" of seamen.

In *Clary*, the plaintiff seaman brought suit for injuries sustained aboard a drilling barge on which he was working. 609 F.2d at 1121. He alleged that OSHA regulations were violated because the steel plate welded to the deck (which he tripped over) was not color coded yellow so as to make it more visible. *Id.* This Court ruled that the district court was correct in refusing to allow the plaintiff to introduce the OSHA regulations into evidence because "OSHA regulations . . . do not apply to working conditions of seamen on vessels in navigation. . . ." *Id.* at 1122. We reasoned that the Coast Guard was the federal agency with statutory authority over the working conditions of seamen, and that its regulations included standards governing the safety and health of persons working on vessels. *Id.* Because *Clary* is indistinguishable from the case at bar, its holding controls our decision.

Respondent attempts to distinguish *Clary* by arguing that this Court, in ruling that OSHA lacked authority to regulate the working conditions of seamen, did not specifically consider whether its holding applied equally to uninspected and inspected vessels. Thus, respondent argues that *Clary* does not bind our

decision as to the uninspected vessel at issue in today's case.

The vessel in *Clary* was a drilling barge—the same type of vessel at issue in this case—and there is no indication from *Clary* that the barge in that case was inspected. Further, the broad language of *Clary* does not turn on any such distinction. [5]

Furthermore, the Coast Guard is no stranger to uninspected vessels. It is expressly authorized to issue safety regulations for uninspected vessels for: (1) the number, type and size of fire extinguishers; (2) the type and number of life preservers; (3) flame arrestors, backfire traps; (4) ventilation of engine and fuel tank compartments; and (5) the number and types of alerting and locating equipment for vessels on the high seas. 46 U.S.C. § 4102. Further, the Coast Guard has issued a number of safety regulations for uninspected vessels, including those related to: life preservers and other lifesaving equipment; emergency alerting and locating equipment; fire extinguishing equipment; backfire flame control; ventilation of tanks and engine spaces; cooking, heating, and lighting systems; safety orientation and emergency instructions; action required after an accident; and signaling lights. *See* 46 C.F.R. §§ 25.01 *et seq*; 46 C.F.R. §§ 26.01 *et seq.* Thus, the Coast Guard has authority to issue safety regulations for uninspected vessels, as well as inspected vessels, and it has

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[5] The additional finding in *Clary* that the OSHA regulations cited by the plaintiff did not apply to a special purpose vessel does not supplant *Clary's* holding that the OSH Act "does not apply to the working conditions of seamen on vessels operating on the high seas," which *Clary* described as the "one significant decision" made therein. 609 F.2d at 1121, 1122.

in fact exercised this authority.[6] The fact that the MR. BELDON is an uninspected vessel is therefore no basis upon which to distinguish *Clary*.

In *Donovan*, this Court revisited the applicability of OSHA regulations to the working conditions of seamen. 720 F.2d 825. Although *Donovan's* facts are distinguishable from the facts of this case, we made it perfectly clear that we were reaffirming the principles we laid down in *Clary*. We stated that "[i]t is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation. . . ." *Id.* at 826. "Nothing in OSHA shall apply to working conditions of seamen on vessels." *Id.* at 827. "[T]he Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from OSHA] for seamen serving on vessels operating on navigable waters." *Id.* at 826.

We gave a number of reasons in *Donovan* for our conclusion that the Coast Guard's jurisdiction is exclusive in this area

> "Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation,

[6] Because a drilling barge is not self-propelled, some of these regulations, by their nature, do not apply to the MR. BELDON. However, this does not change the fact that the Coast Guard has exercised its authority to issue safety regulations for uninspected, as well as inspected, vessels.

> and stultification of enterprise." *Donovan*, 720 F.2d at 827.
>
> We explained that overlapping regulation "might well produce [the] . . . anomaly . . . of steaming in and out of OSHA coverage." *Donovan*, 720 F.2d at 829.
>
> "[A] single, uniform set of rules should govern the maritime workplace. Because of OSHA's geographic limitations . . . this cannot be those of OSHA . . . . [thus] we conclude that it must be those of the Coast Guard." *Donovan*, 720 F.2d at 829.

Because OSHA has no jurisdiction in this matter, we need not address Mallard's contention that the MR. BELDON was not a "workplace" within the meaning of Section 4(a) of the OSH Act.[7]

III.

For the reasons stated above, we hold that OSHA lacked authority to regulate the working conditions of the employees aboard the MR. BELDON; rather, such authority rests solely with the United States Coast Guard. Our precedents are clear on this point and admit of no exception for this case. Thus, the citation OSHA issued against Mallard is VACATED, and the order of the Occupational Safety and Health Review Commission is REVERSED and judgment is RENDERED in favor of Mallard.

[7] Under Section 4(a), the OSH Act applies "with respect to employment performed in a workplace in a State." 29 U.S.C. § 653(a).

APPENDIX B

[Seal Omitted]

United States of America
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Phone: (404) 562-1640 Fax: (404) 562-1650

OSHRC Docket No. 97-1973

SECRETARY OF LABOR, COMPLAINANT

v.

MALLARD BAY DRILLING, INC., RESPONDENT

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Mallard Bay Drilling, Inc.[1] (MBD), owns and operates drilling rigs and barges for oil and gas exploration from its place of business in New Iberia, Louisiana (Joint Exh. J-1). On June 16, 1997, a natural gas explosion occurred on Rig 52 (MR. BELDON), which resulted in death and serious injuries to employees and the total loss of the rig. The U.S. Coast Guard initiated an investigation on June 17, 1997. Also, at the same time, the Occupational Safety and Health Administration (OSHA) initiated its investigation.

As a result of the OSHA investigation, MBD received a serious citation alleging violations of § 5(a)(1) of the Occupational Safety and Health Act (Act) for failing to timely evacuate employees on board the drilling rig; 29 C.F.R. § 1910.120(q)(1) for failing to develop and implement an emergency response plan to handle anticipated emergencies; and 29 C.F.R. § 1910.120(q)(6) for failing to train employees in emergency response. OSHA proposed a penalty of $6,300 for each alleged violation.

The hearing was held on April 27, 1998, in New Orleans, Louisiana. MBD stipulated that it is an employer engaged in a business affecting commerce within the meaning of the Act (Tr. 7). MBD also agrees that if OSHA's jurisdiction is not preempted by the U.S. Coast Guard, MBD withdraws its contest to the alleged violations of § 5(a)(1) of the Act and 29 C.F.R. §§ 1910.120(q)(1) and 1910.120(q)(6) (Tr. 5-6). In exchange, the Secretary amends the proposed penalties to $4,410 for each violation (Tr. 4).

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[1] Subsequent to issuance of the citation, MBD changed its name to Mallard Bay Drilling, LLC (Tr. 120).

MBD argues that OSHA lacks jurisdiction or its jurisdiction is preempted by the U.S. Coast Guard. Based on Review Commission precedent, OSHA's jurisdiction is not preempted.

Background

MBD is engaged in oil and gas drilling explorations in the United States, Africa and the Far East. In business since 1952, MBD's principal place of business is in New Iberia, Louisiana (Joint Exh. J-l; Tr. 122). MBD owns and operates 170 marine units, including drilling barges, such as Rig 52, crew boats and various deck barges (Tr. 96). It employs approximately 1,200 employees worldwide (Tr. 121). MBD's business primarily involves a "work-over" operation, which is work done on a preexisting well to enhance its production capabilities (Tr. 104).

MBD's Rig 52, known as MR. BELDON, was a special purpose barge; one of ten classified deep drilling barges owned by MBD in the United States (Tr. 112). It was a non-self propelled barge which was moved to location by a tug boat (Tr. 121). The stern of the barge had a "key" slot to allow the barge to position the stem-mounted derrick directly over the well. Rig 52 had three decks. The lower deck was designed to allow it to be completely submerged while on location. The second deck was mostly enclosed with steel bulkheads and accommodated generators, mud tanks, mixing vats, mud pumps, parts storage space and the control room. The upper deck of the barge consisted of a large, completely enclosed house (forward) which was the living quarters, galley and office (Joint Exh. J-1; Exhs. C-4, C-5).

Rig 52 was constructed in 1981. Construction plans were reviewed by the American Bureau of Shipping (ABS) (Exh. R-6; Tr. 19). Since initial construction, the rig has neither been classed nor reinspected by ABS. Rig 52 also received a Certificate of Documentation from the U.S. Coast Guard (Exh. R-6). The Coast Guard considered it an uninspected vessel which did not hold a U.S. Coast Guard issued certificate of inspection nor was it required to be inspected by the Coast Guard (Exh. C-1; Tr. 28, 113, 122). *Also see* definition at 46 U.S.C. § 2101(43).

On June 16, 1997, Rig 52 was operating in the Little Bayou Pigeon, a navigable body of water in the territorial waters of Louisiana. It was located approximately 30 miles northwest of Morgan City, Louisiana (Tr. 27). Rig 52 was in the final stages of well completion, pursuant to a drilling contract with Denbury Management, Inc., owner of the well (Joint Exh. J-l, Exh. C-1). The rig had been at the location for approximately 70 days, and the well was at a depth of 13,500 feet (Tr. 121). There were 22 employees on the rig (Tr. 33).

During the final stages, Rig 52 was performing an operation called "reversing out," which is the circulation and displacement of heavy drilling mud from the well. A calcium chloride solution is pumped into the well which displaces the mud. The mud is deposited in a shale shaker on the rig and pumped to an open hopper barge (Joint Exh. J-1). While reversing out, there were a blowout and an explosion which occurred at approximately 9:00 p.m. (Exh. C-1; Tr. 33, 65). The explosion killed and injured several employees.

The U.S. Coast Guard initiated its investigation on June 17, 1997 (Tr. 25). The U.S. Coast Guard estab-

lished a command post, inspected the site and interviewed employees. The scope of the investigation was limited to vessel issues, including hazard recognition, written procedures, engineering, and overall crew competency (Tr. 26-27). As a result of its investigation, the Coast Guard made general recommendations, but no finding of violation by MBD (Exh. C-1).

The OSHA investigation was conducted by compliance officer Michael Sophrer and was limited to the emergency response requirements of § 1920.120. Other than obtaining documents furnished to the U.S. Coast Guard, OSHA did not inspect the barge or interview employees (Tr. 67-68).

Discussion

OSHA has jurisdiction under § 4(a) of the Act.

Section 4(a) of the Act provides in part that:

> This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Act, Johnson Island, and the Canal Zone.

MBD argues that the Act's jurisdiction does not extend to a vessel such as Rig 52 because it is not a "work place" as required by the Act. MBD cites *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983). The *Texaco* case involved a Coast Guard licensed engineer employed on Texaco's deep sea fleet who complained of discrimination under § 11(c) of the Act. The Fifth Circuit concluded that the Act's regulations do not apply to working conditions of seamen on vessels in navigation.

MBD's employees were not licensed nor had certificates from the U.S. Coast Guard (Tr. 108-109). The employees were not seamen as defined by the U.S. Coast Guard (Tr. 29-30). The employees were not performing navigational-related activities (Tr. 32). Rig 52 was considered by the Coast Guard as an uninspected vessel, although it was documented and had an official number (Tr. 28, 43). It was stationary and within the territorial boundaries of the State of Louisiana (Tr. 30). To move from location to location, the rig needed to be towed by a tug boat (Tr. 43).

In considering the application of § 4(a) of the Act, the Review Commission concluded that "OSHA has authority to enforce the OSH Act with respect to vessels that are located in U.S. territorial waters." *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997). Rig 52 was a vessel within the territorial boundaries of Louisiana. It was a workplace.

Section 4(a) of the Act is applicable.

Application of § 4(b)(1) Preemption.

Section 4(b)(1) provides that:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory

> authority to prescribe or enforce standards or regulations affecting occupational safety and health.

The U.S. Coast Guard conducted its investigation under the authority of 46 C.F.R., Part 4, as derived from 46 U.S.C. § 6301. The Coast Guard determined that the Rig 52 accident met the definition of a marine casualty or accident. *See* 46 C.F.R. § 4.03-1. The rig was a vessel in commercial service operating upon the navigable waters of the United States. (Joint Exh. J-1). It was designated by the Coast Guard as a serious marine incident because it involved one or more dealths, multiple injuries requiring medical attention, and there was damage to property in excess of $100,000 (Exh. C-1; Tr. 26).

> To prove the affirmative defense that OSHA's jurisdiction has been preempted under section 4(b)(1), the employer must show that (1) the other federal agency has the statutory authority to regulate the cited working conditions, and (2) that agency has exercised that authority by issuing regulations having the force and effect of law.

Rockwell International Corp., 17 BNA OSHC 1810, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996).

Where the employer claiming the exemption satisfies its burden of proving that another agency has exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). The term "exercise," as used in § 4(b)(1), requires an actual assertion of regulatory authority as opposed to a mere

possession of authority. OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Id.* at 1703-1704.

In the *Alaska Trawl* case, the Commission found that, in the absence of relevant Coast Guard regulations, OSHA jurisdiction over work performed on uninspected vessels was not preempted. There was no industry-wide exemption from OSHA regulations. The Commission dismissed as dictum the implication that *Dillingham Tug & Barge Corp.*, 10 BNA OSHC 1859 (No. 77-4143, 1982), created an industry-wide exemption. *Id.* at 1704-1705. Absent an industry wide exemption, OSHA jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition.

Emergency Response

The OSHA citation alleges that MBD failed to evacuate employees and failed to have an emergency response plan. MBD does not argue or identify any similar requirement enforced by the U.S. Coast Guard.

In *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1924 (No. 93-2529, 1997), the Review Commission found that the Coast Guard only regulates uninspected vessels to a "minimum" degree. The Coast Guard filed an amicus brief in the *Tidewater* case disclaiming comprehensive regulation of uninspected vessels. The Coast Guard described its safety standards applicable to uninspected vessels as solely limited to those areas delineated in 46 U.S.C. Chapter 41, which regulates the (a) number, type and size of fire extinguishers; (b) type and number of life preservers; (c) flame arresters, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and

the (e) number and types of alerting and locating equipment for vessels on the high seas. *Id.* at 1924.

Chief Warrant Officer John Grez of the U.S. Coast Guard, Marine Safety Office, who conducted the investigation into the Rig 52 explosion, testified that the scope of his investigation was limited to issues of hazard recognition, written procedures, engineering and overall crew competency (Tr. 26-27). He agreed that the Coast Guard regulations for uninspected vessels did not address the same concerns regarding employees evacuation and emergency response as cited by OSHA (Tr. 35).

MBD argues the Fifth Circuit case law concludes that Coast Guard statutory authority preempts OSHA. *See Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1150 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). Generally, these cases hold that OSHA regulations do not apply to the working conditions of employees on vessels in navigation.

However, the Review Commission in *Tidewater* analyzed the same Fifth Circuit case law relied upon by MBD. As stated in *Tidewater*:

> Nevertheless, with due respect to the court, we find that *Clary* and *Donovan v. Texaco* are sufficiently distinguishable from the case here presented to have left undecided the precise question of OSH Act applicability to uninspected vessels.
>
> In neither of the cases considered by the court did it differentiate between the extensive degree to which the Coast Guard regulates inspected vessels and the minimal degree to which it regulates those

> that are uninspected. The vessel classifications in those cases were not identified, although the court's consideration in *Donovan v. Texaco* of the MOU between the Coast Guard and OSHA suggests that the vessel there was inspected. 720 F.2d at 827 n.3. Moreover, the court relied in both cases on Commission precedent, subsequently overruled, suggesting that OSHA lacks jurisdiction over the working conditions of seamen. Most significantly in *Clary*, the court found that the cited OSHA construction and shipbuilding regulations did not, by their own terms, pertain to the special purpose drilling vessel on which the injured seaman worked. 609 F.2d at 1122. This fact alone would have been sufficient to decide the case. . . . Similarly, the court's finding in *Donovan v. Texaco*, that the Coast Guard's regulations included protections "parallel" to those contained in section 11(c), would have been sufficient to dismiss the Secretary's case.
>
> Inspected vessels subject to the MOU between OSHA and the Coast Guard are essentially regulated only by the Coast Guard and, consequently, would not steam in and out of OSHA coverage. As to the uninspected fleet, OSHA provides the only significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

Id. at 1927.

Also, MBD cites *Perry v. Falcon Drilling Company, Inc.*, 1995 WL 273538 (E.D. La., 1995) which held that OSHA regulations on stairs and stairways did not apply

to FALCON Rig 16, an uninspected vessel, because of the U.S. Coast Guard's statutory authority. However, the decision in *Perry* is distinguishable from this case. The District Court found that the Coast Guard's regulations applicable for stairs and stairways precluded application of the OSHA regulations. The court stated that "OSHA regulations simply should not apply to govern safety concerns on vessels which have unique problems and concerns best addressed by the Coast Guard." In this case, there is no showing that the Coast Guard exercises authority to regulate employee evacuations and emergency response to hazardous substance releases during an explosion of a drilling rig.

Therefore, pursuant to commission precedent, OSHA jurisdiction in this case is not preempted by the U.S. Coast Guard.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Serious Citation No. 1

1. Item 1, serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of $4,410 is assessed.

2. Item 2, serious violation of § 1910.120(q)(1), is affirmed and a penalty of $4,410 is assessed.

3. Item 3, serious violation of § 1910.120(q)(6), is affirmed and a penalty of $4,410 is assessed.

/s/ KEN S. WELSCH
KEN S. WELSCH
Judge

APPENDIX C

[Seal Omitted]

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of Executive Secretary
Phone: (202) 606-5400
Fax: (202) 606-5050

OSHRC Docket No. 97-1973

SECRETARY OF LABOR, COMPLAINANT

v.

MALLARD BAY DRILLING, INC., RESPONDENT

NOTICE OF FINAL ORDER

The petition for discretionary review filed by the Respondent in the above cited action was received by the Commission on December 17, 1998. The case was not directed for review. Therefore, the decision of the Administrative Law Judge became a final order of the Commission on December 28, 1998. Commission Rule 90(d), 29 C.F.R. § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN

60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Dated: January 6, 1999 /s/ RAY H. DARLING, JR.
RAY H. DARLING, JR.
Executive Secretary

NOTICE IS GIVEN TO THE FOLLOWING:

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APPENDIX D

MARINE CASUALTY NARRATIVE SUPPLEMENT

MCNS 06JAN98

CASE/MC97008193
PORT/ MORMS
SUBJECT/MALLARD RIG 52
DATE/ 17 JUN 97

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— COMMENTS —

EXECUTIVE SUMMARY: On June 16, 1997, the Mallard Rig 52 was in the final stages of completing an oil & natural gas well in the Atchafalaya Basin, St. Martin Parish, Louisiana. During the completion operation, the well kicked, and control of the well was lost. The installed well shutdown system then failed. The off duty crew of the rig was evacuated to an standby tug, and the on duty crew stayed in the rig to attempt well kill operations. Approximately 35 min. after loosing control of the well, a natural gas explosion swept

through the rig. The explosion resulted in the deaths of four rig workers on the second deck of the rig, and the injury of one rig worker on an adjacent work boat. A second rig worker was injured while evacuating from the rig after the explosion. As a result of the explosion and accompanying fire, the rig was declared a total constructive loss.

AUTHORITY: This investigation has been conducted under the Authority of 46 C.F.R. Part 4 as derived from authority contained in 46 U.S.C. 6301. This particular incident meets the definition of a Marine Casualty or Accident from 46 C.F.R. 4.03-1 in that the MALLARD RIG 52 was a vessel in commercial service operating upon the Navigable Waters of the United States. Furthermore, this Marine Casualty meets three of the five conditions for designation as a Serious Marine Incident in 46 C.F.R. 4.03-2 in that; One or more deaths did occur; multiple injuries requiring medical attention did occur; damage to property was in excess of $100,000.00. This Marine Casualty also meets the definition of a Major Marine Casualty contained in COMDTINST 16000.10, Coast Guard Marine Safety Manual Vol. V, Investigations, Chapter 3 in that property damage was initially estimated at more than $500,000.00.

SCOPE: Coast Guard D8m decided to limit the scope of the investigation to purely vessel issues. This investigation does not examine the production related equipment including the drill string, its attachments or subsurface equipment based on the scope as directed by D8m. The Coast Guard does not regulate mineral drilling operations in state waters, and does not have the expertise to adequately analyze all issues relating to the failure of an oil/natural gas well. This report acts

to record the explosion and its resulting damage, and the issues of hazard recognition, written procedures, engineering, and overall crew competency.

PREAMBLE: On 16 June, 1997, the MALLARD RIG 52 was operating on location in Bayou Pigeon, Lake Chicot Oil and Gas Field, on an oil and natural gas well owned by Denbury Management, Inc. The rig had finished drilling Denbury's well at that location approximately two weeks prior, and was in the final stages of the well completion operation. The operation being performed, called "reversing out", was the circulation and displacement of heavy drilling mud (17.5 lb./gal) from the well bore (annulus). This was done by pumping a calcium chloride solution into the well annulus which displaced drilling mud from well through a five (5) inch drill pipe tool string. The mud was then deposited in a shale shaker on the rig and pumped to a open hopper (shale) barge moored along side of the rig. The term reversing out is used because normally, fluids are pumped through the tool string to accommodate 24 hour operations on the rig. The night crew was up and working. The day crew was in the crew quarters sleeping.

EQUIPMENT:

(1) WELL EQUIPMENT IN USE:

a. Outside preventors: The annular blow out preventor stack (BOP) consisted of: (from top down) (See PHOTO # 1 & 2)

1) Annular preventor (hydrill rubber)
2) 5" Pipe ram
3) Blind Ram
4) 5" pipe Ram

b. The tool string (inside preventor) consisted of two (2) Texas Iron Works (TIW) in line ball valves. TIW valves are designed and marketed as a fail safe high pressure emergency shut down in-line valve. The advantage to a TIW valve is that it has a diameter similar to that of the tool string to which it is attached, allowing it to be lowered into the well with the tool string.

(2) MALLARD RIG 52 DESCRIPTION: The MALLARD RIG 52 is a 190' X 50' X 12" posted drilling barge with three separate deck levels, see PHOTO #3, and encl (5). At the lowest deck, the barge deck, there is very little equipment other than hose racks and portable pump storage. The barge deck is completely open on all sides with no enclosures (PHOTO #4). The stern of the barge has a "key" slot to allow the barge to position the stern mounted derrick directly over a well. This deck is designed to allow it to be completely submerged while on location when the water depth exceeds the draft of the barge.

The second deck is approximately 85% enclosed with steel bulkheads, it accommodates Generators, mud tanks, mixing vats, mud pumps, parts storage space, and the electrical SCR (silicone control rectifier) Control Room (PHOTO #5).

The upper deck consists of a large, completely enclosed house (forward) which was the living quarters with a helo deck on top. A pipe rack is located amidships. The stern is the raised rig floor supporting the derrick and rotary table.

The rig was built in 1981. The construction plans were reviewed prior to construction by the American Bureau of Shipping (ABS), however, it cannot be verified if ABS actually oversaw the construction of this vessel. Since initial construction, the rig has neither been classed or re-inspected by ABS.

The rig holds a Coast Guard issued Certificate of Documentation bearing the Vessel Name Mr. Beldon, Official Number #644167, homeported in New Orleans, LA. Gross Tonnage – 1482, net tonnage – 1482. It has never been inspected by the Coast Guard and is not required to hold a Certificate of Inspection or be inspected by the Coast Guard.

There is no record that the rig has been classed or inspected by any regulatory agency or recognized society during initial construction or at any time since. There was no requirement for any of the personnel working on the MALLARD RIG 52 to hold any kind of Coast Guard issued license or Merchant Mariners Document.

INCIDENT:

(1) BLOWOUT: Extending through the well bore, as well as through the rams and preventors, was a five (5) inch drill pipe tool string through which mud was being circulated from the well. At the head of the drill pipe tool string, were two TIW valves spaced approximately 30 feet apart. The valves were installed to allow the drill pipe tool string to be shut off at the surface. Above the TIW valves, a swivel terminated the tool string. Above the swivel was the hook and traveling block of the rig derrick which was used to raise and lower the drill pipe tool string. A high pressure flexible hose led from the swivel to the shale shakers through which the mud traveled after being displaced from the well.

At approximately 21:15, Mr. Paul Standridge, floor Hand working at the shale shakers noticed a sudden increase in mud flow from the well and a slight amount of natural gas in the mud flow. He immediately reported this, over the rig's intercom system, to Mr. Daryl Prejean, the driller onboard the rig. Shortly thereafter, Mr. Prejean noticed a stream of mud leaking from the swivel, he also noticed a sharp increase in pump pressure, from approximately 900 PSI to 1700 PSI. At that time, the rig supervisor (Tool Pusher), Mr. Dillon Trahan, and the representative of Denburry Management, Mr. Johnny Chaddick ran from the tool pusher office in the crew quarters to the rig floor. Mr. Trahan shut the pipe rams, and Mr. Mike McCarthy, mud engineer for Batron, ordered the shutdown of the mud pumps.

Mr. Karl Primeaux was in the tool pushers office when the initial upset occurred. After Mr. Trahan and Mr. Chaddick left the office for the rig floor, Mr. Primeaux, upon his own initiative, rousted out the day crew and directed them to prepare for immediate evacuation to a tug boat tied to the rig. When Mr. Trahan came back to the tool pushers office after leaving the rig floor, he saw the day crew departing for the tug boat and mentally accounted for all evacuated personnel.

When the well was ordered shut in, Mr. Prejean turned off the mud pump, and with the assistance of Mr. Dillon Trahan, Tool Pusher, and person in charge-of-rig, attempted to close the lower of the two TIW valves (PHOTO #6). The valve was located approximately 10 ft. above the rig floor and was only accessible by ladder. In order to close the TIW valve, a removable wrench handle approximately 24" in length was inserted into the side of the valve (PHOTO #7). When the first attempt to close the valve was unsuccessful, Mr. Dillon Trahan lowered the traveling block and brought the TIW valve down to a height of approximately four feet from the rig floor. The TIW wrench was once again placed in the valve and a "cheater" bar (used to gain additional leverage), approximately .10 feet in length, was placed on the wrench handle (PHOTO #8). 6-7 rig personnel then attempted, unsuccessfully, to close the valves. They did succeed in bending the wrench handle.

At that time it was decided that it was impractical to lower the tool string any further to gain access to the upper TIW valve. A short while later the pressure in the well finished blowing out the remaining drilling mud, and the calcium chloride solution used to displace

the mud, along with natural gas started blowing from the well in the form of a finely atomized white mist.

Mr. Chaddick, in the mean time, went back to the Tool Pushers office and made a telephone call to Mr. Carry Redman, the Project Engineer for Denburry Management. According to Mr. Chaddick, Mr. Redman recommended that mud be pumped back into the well in a well kill attempt, but if the danger was too great, evacuate the rig.

When it became apparent that the well could not be shut in by the TIW valves, Mr. Dillon Trahan ordered the rig floor cleared and the crew assembled in quarters. He then proceeded to his office in the crews quarters. The remainder of the rig personnel assembled in the changing room adjacent to the Tool Pushers Office.

Mr. Trahan then had a telephone conversation with Mr. Leroy Broussard of Mallard Drilling. Mr. Broussard recommended that Mr. Trahan take any actions he deemed necessary, and use his own judgment in any decision to evacuate the rig. Mr. Trahan then went back to the rig floor and turned the pump back on to continue pumping calcium chloride into the well. The pump remained on throughout the remainder of the evolution. Mr. Trahan then returned to the tool pusher office.

(2) EVACUATION OF NON ESSENTIAL PERSONNEL: As stated earlier, when it became evident that a blowout had occurred, Mr. Karl Primeaux took it upon himself to evacuate nonessential personnel from the rig. Personnel were awakened from their quarters and

evacuated to a tug boat which was standing by at the rig. The following personnel were evacuated:

Sean Savage
Shane Redwing
Brian Miller
Karl Primeaux
Shane Vincent
Nicholas Jimenez
John Griffin
Leslie Rainer
Robert Davis
Clint Sonnier

(3) WELL KILL ATTEMPT: After a short consultation with the company man, Mr. Trahan ordered the crew to rig portable pumps and hoses to pump mud from the adjacent shale barge to the rigs slugging pit on the second deck. Then pump the mud from the pit into the well in a dynamic kill attempt. Mr. Trahan then went to the second deck to assist in rigging pumps. Once a portable pump was running, he went into the generator room and closed the door on the aft bulkhead (PHOTO #9). He then proceeded to the tool pushers office to cleanup. Mr. Chaddick also went to the second deck and checked on the progress of the pumps, once he saw that one was running, he went to the rig floor and to the shale shakers to see if personnel were still in those locations. He then went back to the tool pusher office to make another telephone call.

The theory behind a dynamic kill attempt is to fill the entire well annulus, and tool string, with a heavy weight drilling mud. The hydraulic pressure of column of mud in the well will overcome the gas or fluid pres-

sure present in the well formation and stop the flow. Large quantities of mud under very high pressure must be pumped into the well to achieve this hydraulic pressure overbalance. In order to calculate the weight of mud needed and the pumping pressure necessary, the Tool Pusher called the MISS DEE DEE (crew boat) and requested that the mud engineer, Mr. McCarthy, who had already been evacuated, return to the rig.

All of the mud pits on the second deck had previously been cleaned and contained no mud. The slugging pit had a piping configuration which allowed mud to be pumped from the pit directly into the well annulus. Large quantities of mud were needed and available in the shale barge adjacent to the rig.

Personnel were attempting to rig portable pumps and hoses to pump mud from the barge into the slugging pit. In order to rig the necessary pumps, hoses, and air lines (to power the pumps); personnel were moving between the barge deck level and the second deck level. After successfully starting the operation of one portable pump, personnel were dispatched from the second deck to the shale barge to tend the suction line. Additional personnel started rigging a second pump (PHOTO #10). This is the operation which was in progress when the explosion occurred.

(4) EXPLOSION: At approximately 21:45, a natural gas explosion occurred. Natural gas from the leaking well, over a time period of approximately 30-40 min. spread in explosive concentrations throughout the rig. The explosion most likely originated in the aft portion of the second deck. From there, the explosion quickly

spread, either in a series of secondary explosions, or in one continuous explosion, to other portions of the rig.

EXPLOSION DAMAGE: As a result of the explosion(s), the forward bulkhead of the generator room was displaced forward (PHOTO #11), and the aft bulkhead of the generator room was displaced aft (PHOTO #12 & 13). A hatch plate in the generator room overhead was propelled upward and clear of the rig. It was not located during the investigation (PHOTO #14). Just forward of the generator room, was the pump room. The starboard mud pump showed evidence of an internal explosion. A steel access plate to the motor was violently pushed out and deformed (PHOTO #15 & 16), a shaft guard on the port side of the pump was misaligned (PHOTO #17), and there were cracks in the welds holding the guard in place (PHOTO #18). From the pump room forward, for a distance of approximately 73 feet, the bulkheads were 1/2 height from the deck to a height of approximately four (4) feet (PHOTO #5). The upper portion was open and allowed air circulation. In this area, the lower portion of the starboard bulkhead was buckled outward, but was intact (PHOTO #19). The major force of the explosion in this area appears to have diffused through the open, upper half of the bulkhead. Two persons working in the vicinity of the mud tanks and pits in this area were propelled forward to the bow of the rig by the force of the explosion. Forward of that, the bulkheads enclose, forward, port & starboard, the remainder of the second deck. The majority of the damage from the explosion is contained to this area. In this area the deck was displaced downward approximately 2-4" (PHOTO #20-24). The overhead was displaced upward up to 8" (PHOTO #25 & 26). The

entire forward and port bulkheads, as well as the majority of the starboard bulkhead were opened outward (PHOTO #27-33). In this enclosed area, there was also major damage to equipment.

IGNITION SOURCE: From the explosion damage noted above, and interviews with Mallard Electricians, Mr. Jerry L. Dennis of U.S. Treasury Department, Bureau of Alcohol, Tobacco & Firearms. The most likely area of the source of ignition on the MALLARD RIG 52 was the pump room. This report does not conclusively identify the actual source of ignition.

According to Mr. Dennis, after examining photographs of the rig and the rig plans, the explosion most likely originated in the pump room. This is evidenced by the outward displacement of the aft bulkhead of the generator room (PHOTO #12 & 13), which was located just aft the pump room; by the outward displacement of the starboard bulkhead in the pump room and in the vicinity of the mud pits (PHOTO #19). Perhaps the most compelling reason to suspect that the explosion occurred in the pump room was the locations of the bodies of Mr. Duhon and Trahan who were both propelled forward along the second deck. In order for that to have occurred, the explosion must have originated aft of their last known location, the mud pits.

The damage to the wire mesh screening along the forward bulkhead of the generator room is believed to have occurred from a negative pressure vacuum following the initial explosion (PHOTO #11). This vacuum would also account for the door to the SCR Room which was found in the generator room (PHOTOS #34 & 35). The amount of damage in the generator room and SCR

Room does not support the explosion initiating in these areas.

Mr. Bobby Jordan, in his interview, stated that the mud pumps in the pump room were powered by electrical traction motors. These motors produced sparks while operating. The starboard mud pump was operating at the time of the explosion pumping calcium chloride solution into the well annulus. This was verified by Mr. Dillon Trahan. As stated earlier, the starboard mud pump shows evidence of an internal explosion in that an electrical access plate on the motor housing was damaged. The plate was both concaved and pushed outward. Two bolt holes at the top of the plate were elongated and torn where they were pushed loose from their retaining bolts. The bottom two retaining bolts on the plate held the bottom edge of the plate in place (PHOTOS #15 & 16). This starboard pump most likely the source of ignition for the larger explosion(s) which occurred on the MALLARD RIG 52.

DEATHS: There were four (4) deaths as a direct result of this explosion.

When the explosion swept forward on the 2nd deck, both Yancy Duhon and Clifford Trahan were reportedly in the vicinity of the mud pits. This was just aft of the location of the worst damage on the rig. Both were propelled forward along the second deck and through the now opened forward bulkhead (PHOTO #27) which had been ripped outward, and clear of the rig.

Mr. Frank Nunez was in charge of the Crew Boat MISS DEE DEE which was assigned to the rig. After the tug had left the rig, he was sent, in the crew boat, back to

the tug, to retrieve Mr. Mike McCarthy to assist in the well kill operation. Mr. Nunez and Mr. McCarthy were last seen standing on the bow of the second deck. During the explosion, the forward bulkhead of the second deck was blasted outward and across the location where they stood (PHOTO #27).

(1) YANCY DUHON: The body of Mr. Yancy Duhon was located directly forward of the bow of the rig resting on the bank, a distance of approximately 100 ft. Accordingly to Officers with the St. Martin Parish Sheriff Office who located the body, there was apparent damage to trees approximately 10 feet upon the area where Mr. Duhan was found, indicating that he struck the trees before coming to rest on the ground.

An autopsy was conducted on the body of Yancy Duhon by the St Martin Parish, Louisiana coroner, Dr. Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intracranial open basilar skull fracture."

Post Mortem drug testing of Mr. Duhon was negative. Post-Mortem blood alcohol testing of Mr. Duhon indicated a Ethyl Alcohol BAC of 0.02% W/V. A notation on the a Laboratory report on Mr. Nunez from Acadiana medical Laboratories, LTD, the same laboratory which performed Post-Mortem alcohol testing on Mr. Duhon indicated that a similar level of Ethyl Alcohol may be present as the result of Post-Mortem Decomposition.

(2) CLIFFORD TRAHAN: The body of Mr. Clifford Trahan was located directly forward of the bow of the rig, in the water.

An autopsy was conducted on the body of Clifford Trahan by the St. Martin Parish, Louisiana coroner, Dr Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intrathoracic rupture of heart and intra abdominal rupture of abdominal aorta."

Post Mortem drug and alcohol samples were taken during the autopsy performed on Mr. Trahan. The results of those tests are not yet available.

(3) FRANCISCO NUNEZ: The body of Mr. Francisco Nunez was located in the water on the starboard side, amidships, of the rig by a body drag.

An autopsy was conducted on the body of Francisco Nunez by the St. Martin Parish, Louisiana coroner, Dr. Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intracrainal open basilar skull fracture and intrathoracic laceration of ascending aorta and avulsion of left lung and hemothorax and intraabdominal liver/spleen/kidney rupture."

Post Mortem drug testing of Mr. Nunez was negative. Post Mortem blood alcohol testing of Mr. Nunez indicated a Ethyl Alcohol BAC of 0.01% W/V. A notation on the a Laboratory report on Mr. Nunez from Acadiana medical Laboratories,LTD, indicated that this level of Ethyl Alcohol may be present as the result of Post-Mortem Decomposition.

(4) MIKE McCARTHY: Mr. Mike McCarthy appears to have been trapped between the forward bulkhead of the second deck, and a hand railing. When the explosion occurred, the forward bulkhead of the second deck pushed him against the hand railing. Part of Mr. McCarthy's body was located in the water approximately 50 feet from the starboard stern of the rig. The remaining portion of Mr. McCarthy's body was located in the water forward of the bow of the rig by a body drag.

INJURIES: There were two injuries associated with the explosion.

(1) BOBBY JORDAN, the rig electrician, was awakened, presumably by Mr. Primeaux. Since he was wearing ear plugs, he did not hear any evacuation order. He took the time to get dressed, and when he came out of his room, learned that a well blowout had occurred. He went to the door, and saw personnel working on the rig floor. Becoming concerned, he went to wake up the day crew and found them gone. At that time, he went to the bow of the rig and saw the tug boat backing away from the rig (evacuating the day crew). He then want back aft in the quarters and saw Mr. Trahan, Mr. Chaddick, and the night crew. He decided to stay out of the way and went back to his room to gather his possessions. From there he went to the aft door of the quarters and saw a "white mist" in the vicinity of the shale shakers. He became concerned about the possible presence of natural gas and went to the second deck to find Mr. Dillon Trahan. Once on the second deck, he did not find Mr. Dillon Trahan, but did observe other persons working on the pumps. He then went down the stairs on the bow of the rig, and went to the

Crew Boat MISS DEE DEE (PHOTOS #36-38) to get some ear plugs. He was standing on the back of the MISS DEE DEE when the explosion occurred. He received a blow to the head from an unknown object, was knocked to the deck, and had a piece of steel deck grating land on top of his body. He received injuries to his shoulder, head, neck, and back; twisted his ankle, and sustained broken ribs.

(2) JOHNNY CHADDICK was in the tool pushers office dialing the telephone when the explosion occurred. After the explosion occurred, he entered the main fore & aft passageway in the quarters house and attempted to exit at the forward door. His vision was obscured by smoke, and he encountered an unknown obstruction which prevented him from exiting at the bow. He then turned around and proceeded to the aft door. Upon exiting the quarters, he encountered heavy smoke and heat. He attempted to go down the ladder on the port side to the second deck, but was blocked by smoke. He then proceeded forward along the port side of the crew quarters along an overhanging catwalk (PHOTO #39). About 2/3 of the way forward along the crew quarters, he became trapped and could go no further forward. Smoke and heat prevented him from going aft. At that time, he saw a barge moored along the port side of the rig below his position, and decided to jump. When he landed, he was injured too badly to move. At that time, he saw the Crew Boat MISS DEE DEE leaving the vicinity of the rig. He found a life jacket close by and waved it, catching the attention of Mr. Aaron Stran on the boat, which turned around and picked him up. As a result of the fall, he received two broken ankles, a compression fracture of a vertebra, two bulging discs, a bruise on his arm, and persistent leg pain.

OTHER PERSONNEL ON RIG: At the time of the explosion, personnel were in the following locations on the rig:

(1) DILLON TRAHAN had just entered his quarters to clean up. He was having trouble seeing because of the well fluids on his glasses. He changed his shirt and was starting out of the door from his room into the Tool Pushers Office when the explosion occurred. He followed Mr. Chaddick, who was also in the office, forward along the center hallway of the quarters until they came to an obstruction. Mr. Trahan did not remember smoke in the passageway, but rather darkness. He then turned and went aft in the hallway to the aft door of the quarters. Upon exiting the quarters, he turned to his left, and went down the ladder to the second deck. From there, he proceeded forward to the bow. Once on the bow, he jumped from the second deck on to the aft deck of the MISS DEE DEE.

(2) DARYL PREJEAN: After rigging pumps on second deck, was ordered to the barge deck to tend the portable pump suction line. When the explosion occurred he was on the shale barge. He immediately proceeded to the MISS DEE DEE for evacuation.

(3) PAUL STANRIDGE: After assisting with pumps on the second deck, he was ordered to the barge deck to help rig a second pump. He was knocked to the deck by the force of the explosion, got up, and went to the MISS DEE DEE.

(4) GILBERT MARTIN: Working between the barge deck and the 2nd deck assisting in the rigging of air pumps. He happened to be on the barge deck when the

explosion occurred. He was knocked to the deck by the explosion, got up and proceeded to the MISS DEE DEE.

(5) AARON STRAIN: After helping to try and close the TIW valve, he went with the rest of the crew to quarters to await instructions. After being instructed to rig pumps, he proceeded to the second deck. After a few minutes on the second deck, his eyes started to burn from the "white mist" filling the deck in the vicinity of the pumps. At that time, he proceeded to the MISS DEE DEE. He was in the forward cabin of the MISS DEE DEE when the explosion occurred.

(6) JOE TRAVINO: No interview conducted.

ISSUES:

(1) EVACATION ORDERS: Mallard Drilling, upon request, submitted a complete copy of their company safety manual. Mallard Drilling does not have a separate and specific manual written for each of it's drilling rigs. There are no written procedures available for rig evacuation to be followed in the event of a well blowout. Mallard Drilling, however, does provide a "FIRE AND ABANDON PLATFORM DRILL" section in their safety manual (page A-14). It states that "all drills should be conducted in accordance to the posted station bill", and provides the following specifics (paraphrased).

a) Should be conducted "once a hitch" and include all personnel
b) Should be pre-planned and emphasize key points.
c) Alarm should be sounded as posted on station bill. Drill announcement should be made on PA system.

d) All personnel should report promptly to their assigned station unless excused to continue operations.
e) communications should be tested by notifying shorebase and standby boat.
f) All personnel wear PFD.
g) Document drill on IADC report.

I received a copy of a STATION BILL which was reportedly posted in the Tool Pushers Office aboard the MILLARD RIG 52. The bill addresseS procedures for: Fire and Emergency, Man Overboard, and Abandon Rig. The bill specifies that the rig general alarm system be activated immediately during any emergency evolution, and then goes on to delineate general responsibilities by position. It does not specifically address the occurrence of a blowout.

Records of emergency drills conducted aboard the MALLARD RIG 52 were obtained from Mallard Drilling during the course of this investigation. The records show that on average, emergency drills were conducted aboard the rig weekly. The drill sheet specifies that a muster of personnel be taken immediately during all drills. During this actual emergency, no formal muster was ever completed.

On page C-2 of the Mallard Drilling Safety manual, Paragraph 19 states that attendance at weekly safety meetings and participation in drills is mandatory.

According to the statement of Mr. Dillion Trahan and all other rig workers, with the single exception of Mr. Chaddick, at no time during the emergency did anyone sound the rig general alarm system. Nor did Mr. Dillon Trahan order an evacuation. Mr. Trahan was aware

that an evacuation of nonessential personnel had occurred, and distinctly remembered taking a quick mental accounting of personnel when he saw them leaving the rig.

Mr. Chaddick, in his interview, was adamant in his contention that Mr. Trahan sounded the rig alarm system. All other personnel interviewed consistently stated that no alarms were sounded. I cannot account for this discrepancy in statements.

No general evacuation of the on duty crew of the rig was ever conducted. At the time of the explosion, the decision to stay and kill the well had already been made by Mr. Trahan. This decision was made based on Mr. Trahan's assumptions that:

a) The natural gas blowing from the well was lighter than air and would not settle onto the rig.
b) The well could be brought under control in a reasonable amount of time.
c) Adequate equipment and supplies were available on scene to bring the well under control.

As stated earlier, Mr. Trahan had called his supervisor, Mr. Leroy Broussard, who recommended that Mr. Trahan use his own judgment to evacuate or control the well. Based on his own training and experience, Mr. Trahan decided to control the well. In retrospect, it has been shown that all of Mr. Trahan's assumptions were incorrect.

(2) TRAINING AND QUALIFICATION: Mr. Dillon Trahan, the Tool Pusher on the MALLARD RIG 52 had attended an U.S. Department of Interior, Minerals

Management Service (MMS) approved WELL CONTROL FOR DRILLING/COMPLETION & WORKOVER SUPERVISOR School in April, 1997. The course was instructed by Randy Smith Drilling Schools. A review of the course curriculum showed that the course is broken down into standards. Each standard then has performance criteria which must be met. The course focuses in recognizing early well control problems, developing a plan of action, and executing the plan. In a conversation with Mr. Jay O'Conner, Instructor for Randy Smith Drilling Schools, I found that the course does not address major failure of well control equipment, or when it is safer to abandon the rig then control the well. No class discussion was held on the topic of abandonment, and no case studies were presented in class which involved abandonment. Rig abandonment and total loss of well control are not covered by the MMS requirements for this course. Since this course is developed and approved by MMS, it is only required for operators of offshore drilling rigs.

Mr. Trahan also attended a OSHA approved CONFINED SPACE ENTRY & WORK ACTIVITIES AND THE DUTIES AND RESPONSIBILITIES OF THE OSHA DESIGNATED COMPETENT PERSON. This course of instructions covers the monitoring of confined spaces for the presence of flammable and oxygen deficient atmospheres. It does not address the monitoring of ambient air for the presence of flammable gases.

I received no other information regarding the training and qualification of Mr. Trahan. Mr. Trahan does have approximately 30 years of experience in oil field related work.

(3) BLOW OUT PREVENTORS: The installed outer (annulus) Blow Out Preventor stack (BOP's) are not at issue in this investigation. The BOP's were capable of sealing the well annulus, not a drill pipe or tool string. The annular preventor places a relatively low pressure (5000 PSI) rubber seal around the outside circumference of the pipe. The 5" pipe rams likewise place a seal around the pipe, but a higher pressure seal. Pipe rams are also capable of holding the pipe string from falling back into the well when disconnected from the traveling block. The blind ram can only be actuated when there is no pipe extending through the well bore. It consists of two interlocking, flat faced plates which, when fitted together, seal off the well bore. In this case, the only type of BOP which would have helped would have been a shear ram. A shear ram has two interlocking plates with cutting edges, which when closed, would have been capable of shearing through the well string, then sealing in the same manor as a blind ram. No shear rams were installed on this well, nor is it common practice to have them installed on inland drilling projects.

(4) TIW VALVES: The TIW valves in use may also be considered a BOP device. While it is evident that the lower TIW valve failed to operate as expected, the cause of that failure has not been pursued as part of this investigation. Reportedly, both TIW valves from the MALLARD RIG 52 were removed, boxed, and placed in storage after the rig was taken off location. No analysis or visual surveys of the valves have been conducted to determine the cause of their failure.

(5) GAS DETECTION: A fixed gas detection system was installed in the vicinity of the Shale Shakers on the

MALLARD RIG 52. This gas detection system was meant only to detect gas in the drilling mud. This system had installed audible alarms at the shale shakers, drillers console, and in the tool pushers office. Rig personnel all stated that they had heard the alarm the previous week, but could not tell if it was sounding when the well was flowing out of control due to the background noise level of the blowout. There is some indication that this system may have been turned off prior to the blowout. Mr. Chaddick stated that after mud wad pumped into the well and the packers in the well were set. The system was turned off.

The tool pusher also had at his disposal a "MSA WATCHMAN MULTIGAS DETECTOR". This piece of equipment is a portable explosive gas meter which measures flammable gases in % of lower explosive limit (LEL). The meter was typically kept on the tool pushers desk in his office. The meter was not available for my inspection as it was destroyed during the explosion and fire. The main use of the meter onboard the rig was to test enclosed spaces prior to entry. At no time, during the 30-40 min immediately proceeding the explosion, when the well was out of control did Mr. Trahan test the atmosphere at any location on the rig for the presence of explosive or flammable gases. When asked why, Mr. Trahan replied "I didn't smell gas".

(6) NATURAL GAS PROPERTIES: According to THE MERCK INDEX, NINTH EDITION, natural gas has the following properties:

Composed of: about 85% methane, 9% ethane, 3% propane, 2% nitrogen, and 1% butane.

With methane being the major component of natural gas, methane has the following properties: colorless, odorless, non-poisonous, flammable gas. Specific gravity (in air) 0.554. Forms explosive mixtures in air. Most explosive at 1 part methane/10 part air concentration. A 14% methane concentration in air burns without noise.

(7) Greenhill Petroleum, Timbalier Bay, October 1992.

In early October, 1992, the crew aboard an inland drilling rig (Posted Barge) was conducting a back surge operation under the supervision of a hired toolpusher when they lost control of the well. A blowout occurred, and approximately 42 1/2 hours later, the well ignited. The incident resulted in one injury, total constructive loss of the rig, and a total discharge of approximately 400,000 gallons of crude oil.

(8) Henry Production, Intracoastal City, July 1994.

A workover barge was conducting a well perforation operation on an existing well for Henry Production. During the operation, the well kicked, and became uncontrollable. During the second day of the blowout, the well ignited while well control teams were working in the vicinity, killing two persons, and injuring four others. Approximately 12,000 gallons of light crude oil was discharged from the well.

(9) Parker & Parsley Petroleum, Meyette Point, November 1996

While conducting workover operation on existing well with an inland drilling rig, the well kicked. When the annular blow out preventor (BOP) was shut in, a gasket on a flange below the BOP failed. After several attempts were made to secure the well, the rig was shut down and moved off location. No injuries or deaths. Approximately 15,000 barrels of light crude oil condensate discharged.

CONCLUSIONS:

1. A well upset occurred at approximately 2115, 16 June 97.

2. Personnel on the MALLARD RIG 52 were not able to bring the well back under control through the use of installed safety devices.

3. Natural Gas started blowing from the well shortly after the initial well upset and continued to blow from the well through the time the explosion occurred.

4. Natural gas spread, in explosive concentrations throughout the MALLARD RIG 52 except for hotel/office spaces located on the third deck.

5. Personnel in supervisory positions on the MALLARD RIG 52 did not recognize the hazard of an explosive natural gas/air mixture forming on the rig.

6. Personnel on the rig had a portable flammable gas detection device which they failed to use. There was no

written direction to use a portable gas detection device during well control operations.

7. Emergency and evacuation drills were conducted weekly on the MALLARD RIG 52 and documented in written reports.

8. Since a well control operation was being attempted, the available SCR shutdown switches were not used to de-energize the electrical systems on the MALLARD RIG 52.

9. When the well upset occurred, the established procedure of sounding a fire & emergency signal on the MALLARD RIG 52 general alarm system did not occur.

10. When the off duty crew was evacuated from the MALLARD RIG 52, the established procedure of sounding a abandon rig signal on the rigs general alarm system did not occur.

11. When the well upset occurred, the established procedure of mustering personnel and assigning tasks on the rig did not occur.

12. Mr. Trahan's responsibility was to direct emergency operations on the MALLARD RIG 52. Mr. Trahan did not direct the attempt to kill the well. Mr. Trahan did not direct the evacuation of any of the rigs personnel.

13. Mr. Chaddick's responsibility was to standby the telephone and radio on the rig and contact boats for evacuation. Mr. Chaddick did not stay in the tool pusher's office to carry out this responsibility.

14. The off duty driller, Mr. Karl Primeaux carried out his responsibility in clearing persons from the living quarters as per established procedures.

15. The off duty crew, with the exception of Mr. Bobby Jordan, evacuated from the rig IAW established procedures.

16. The Tool Pusher called his company office for instructions regarding whether to control the well or evacuate the rig.

17. The Company Man, Mr. Chaddick called his office for instructions regarding whether to control the well or evacuate the rig.

18. No specific company direction existed for blowout control.

19. Numerous sources of ignition existed on the MALLARD RIG 52. The actual source of ignition on the rig remains unknown.

RECOMMENDATION:

1. That state governments conduct regulatory oversight and enforcement of all Energy drilling and workover operations within state waters.

ENCLOSURES:

(1) Photographs 1-39
(2) Mallard Drilling, Safety Policy Manual, Pages A-14 & C-2
(3) Well Blowout Report as submitted to Louisiana Department of Natural Resources by Denbury Management, Inc.
(4) Mallard Rig 52 Station Bill
(5) Mallard Rig 52 plan
(6) Mallard Rig 52 Fire Control Plan
(7) Mqllard Rig 52 Certificate of Documentation
(8) Crew Boat Miss Dee Dee Certificate of Documentation
(9) Map showing Mallard Rig 52 on the well location

APPENDIX E

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

Honorable Walter F. Mondale
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

This is to transmit to you a report pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor

Enclosure

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This is to transmit to you a report pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor

Enclosure

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

TO THE CONGRESS OF THE UNITED STATES;

I am submiting the enclosed report pursuant to section 4(b)(3) of the Occupational Safety and Health Act, which requires that the "Secretary of Labor shall, within three years after the effective date of the Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws."

Views within the Executive Branch on this matter have not been coordinated. Accordingly, this report reflects only the views of the Department of Labor. It is our view that there is at this time no need for legislation on this subject.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor

REPORT OF THE SECRETARY OF LABOR TO CONGRESS PURSUANT TO SECTION 4(b)(3) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, ON THE SUBJECT OF COORDINATION IN THE ADMINISTRATION AND ENFORCEMENT OF THIS ACT AND OTHER FEDERAL LAWS AFFECTING OCCUPATIONAL SAFETY AND HEALTH

I. Introduction

This report by the Secretary of Labor is submitted to Congress pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970, which provides:

> The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

II. Background

The Occupational Safety and Health Act of 1970 is a comprehensive statute covering all employers who are engaged in a business affecting commerce and who have one or more employees and was designed to ". . . ensure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." In enacting this comprehensive statute, Congress also took into account those provisions of other Federal laws which, to various degrees, deal with

worker safety and health issues. Section 4(b)(1) states, in pertinent part, that:

> Nothing in this Act shall apply to working conditions with respect to which other Federal agencies . . . exercise statutory authority to prescribed or enforce standards or regulations affecting occupational safety and health.

Generally speaking, this language means that the OSH Act's protections apply only where there exist no legally enforceable standards or regulations of another Federal agency addressing a particular hazard. Under this framework, gaps in employee protections are avoided while at the same time the regulatory activity of the other agencies is not affected; viewed in this light, section 4(b)(1) places a limit only on the authority of the Department of Labor.

The OSH Act contains a detailed framework of enforcement and educational activities, including numerous employee rights, designed to achieve employee protection. Even where the OSH Act is preempted under section 4(b)(1), there is still an understandable expectation on the part of many employees and their representatives that the quality of protection and the range of rights afforded by the OSH Act would be provided for all workers and in all hazardous working conditions. The Department recognizes this concern and has taken steps to promote a coordinated approach to occupational safety and health programs throughout the Government by means of interagency agreements.

III. Court and Review Commission Interpretation of Section 4(b)(1)

A number of decisions of the Occupational Safety and Health Review Commission (OSHRC) and the courts of appeals have interpreted section 4(b)(1). Several courts have ruled that workers may not be denied protection under the OSH Act for *all* hazards they face because their industry happens to be regulated in part by another federal agency which has issued rules for *some* worker hazards.

In other words, these courts hold that industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards. The courts have also held that in order for preemption to take place, the standard or regulation of the other agency must be in a final rule, not simply a notice of proposed rulemaking or an advance notice of proposed rulemaking.[1] At the same time, the evolving section 4(b)(1) law indicates that this preemption of OSHA does not depend on the efficacy of other agency's standards or its enforcement mechanisms.[2]

These and other cases are shaping current federal policies for worker safety and health. To be sure, there are remaining issues to be decided by the courts which

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[1] See *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Baltimore and Ohio R.R. Co.* v. *OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976); *Southern Railway* v. *OSHRC*, 539 F.2d 335 (4th Cir. 1976), cert. denied, 429 U.S. 999 (1976).

[2] See *Mushroom Transportation Co.*, OSHRC Docket No. 1588, 1973-74 CCH OSHD ¶ 16,881 (R.C. 1973), appeal dismissed (3rd Cir. 1974); *Pennsuco Cement and Aggregates, Inc.*, OSHRC Docket No. 15462, 1980 OSHD ¶ 24,478 (R.C. 1980).

will help further define the roles of the OSH Act and other federal laws in protecting workers. We are satisfied, however, that current case law in general has adequately preserved the primary intent of section 4(b)(1), which is to provide maximum worker protection contemplated by Congress in enacting the comprehensive OSH Act and at the same time to avoid duplication of effort by Federal agencies.

IV. Quality of Procession

There are only two federal agencies that deal exclusively with occupational safety and health and both of these are in the Department of Labor: the Occupational Safety and Health Administration and the Mine Safety and Health Administration. No other federal agencies have as their exclusive purpose the protection of workers from on-the-job injuries and illnesses. The statutes administered by other agencies that have an occupational safety and health role are designed primarily or in significant part to protect the public or equipment. Agencies of the Department of Transportation, for example, have as major purposes protecting the public and transportation equipment: i.e., the safe operation of trains (Federal Railroad Administration), aircraft (Federal Aviation Administration), certain vessels (Coast Guard), and certain trucks and buses (Bureau of Motor Carrier Safety). Because those agencies have other statutory functions, they cannot devote exclusive attention and resources to employee protection.

The absence of this primary focus on occupational safety and health has at times resulted in criticism of other agencies by employees, their representatives, and Congress concerning their programs. These criticisms

have related primarily to the efficacy of their enforcement activities.

In a recent example, a General Accounting Office Report, dated July 21, 1980, pointed out that the Department of Energy has not been properly implementing its safety and health programs for employees at its contractor-operated uranium enrichment plants. In another recent instance, flight attendants contended in Congressional hearings that the Federal Aviation Administration has no effective enforcement program for in-flight occupational hazards even though the FAA has maintained that it has full statutory authority over such hazards. In another example, the Coast Guard was criticized by Congress for failure to protect merchant seamen from the hazards of asbestos.

In addition to these criticisms that stem from multiple agency functions, many workers have voiced concern about the statutory mechanisms of some of the other agency programs as they relate to occupational safety and health. A number of the other Federal statutes under which workers are covered lack certain important provisions contained in the OSH Act which this Department has repeatedly stated are essential to strong occupational safety and health programs. These include:

- the right of employees to file anonymous complaints about alleged hazards and the responsibility of the agency to respond to those complaints;

- the right of employee representatives to accompany a federal inspector during investigations of working conditions;

- authority of the agency to propose monetary penalties as an incentive for employers to comply voluntarily with safety and health standards;

- authority to seek injunctions to protect employees in imminently dangerous situations; and

- authority to compel the prompt abatement of hazardous working conditions.

In addition, certain industry groups have on occasion complained of duplication and overlap by OSHA and other agencies in regulating and enforcing occupational safety and health concerns.

Numerous actions have been taken to deal with these concerns. Agreements between OSHA and other agencies have led to increased understanding, cooperation, reduction of overlap, elimination of recordkeeping duplication and consequent reductions in employers' paperwork burdens, use of OSHA standards by other agencies, and sharing of technical information and enforcement resources. A list of these Memoranda of Understanding is attached. Furthermore, OSHA has cooperated with other agencies in the formulation of legislative proposals dealing with occupational safety and health issues, such as trucking safety, that include compliance provisions parallel to those in the OSH Act.

V. Conclusions and Recommendations

Preventing duplication of effort and achieving coordination between the OSH Act and other Federal statutes is, in the Department's opinion, being adequately addressed under existing authority. As the

courts continue to refine the interpretation of section 4(b)(1) of the OSH Act, an even clearer picture of each Federal agency's role for worker safety and health will emerge. Federal policies will continue to be adjusted to conform to the court's interpretations. In addition, cooperative efforts between Federal agencies will continue to expand. The Department sees no need for, and therefore does not recommend, legislation on the subject of occupational safety and health jurisdiction.

APPENDIX F

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Authority To Prescribe and Enforce Standards or Regulations Affecting Occupational Safety and Health of Seamen Aboard Vessels Inspected and Certificated by the United States Coast Guard; Memorandum of Understanding

Thursday, March 17, 1983

Purpose

It is the purpose of this memorandum of understanding (MOU) to set forth clearly the boundaries of the authority of the United States Coast Guard (Coast Guard) of the U.S. Department of Transportation and the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor in prescribing and enforcing standards or regulations affecting the occupational safety and health of seamen aboard vessels inspected and certificated by the Coast guard (hereinafter "inspected vessels"). This MOU is intended to eliminate confusion among members of the public with regard to the relative authorities of the two agencies. Nothing in this MOU pertains to uninspected vessels. The Coast Guard and OSHA agree to work together to fulfill their respective authorities.

Authority of the Coast Guard

The Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard inspected vessels. Under the vessel Inspection Laws of the United States, the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard inspected vessels.

These comprehensive standards and regulations include extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations. These standards and regulations are generally set forth at 46 CFR Chapter I, and in the Coast Guard's Marine Safety Manual and its Navigation and Vessel Inspection Circulars.

OSHA has a general statutory authority to assure safe and healthful working conditions for working men and women under the Occupational Safety and Health (OSH) Act of 1970. Section 4(b)(1) of the OSH Act defines the relationship between OSHA and the other federal agencies whose exercise of statutory responsibilities may affect occupational safety and health. Based on OSHA's interpretation of section 4(b)(1), and as a result of the Coast Guard's exercise of its authority, described above, OSHA has concluded that it may not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels. Nonetheless, OSHA retains the following responsibilities.

OSHA retains its authority under section 11(c) of the OSH Act, which forbids discrimination in any manner against employees who have exercised any right afforded them under the OSH Act. Pursuant to this provision, OSHA has the authority to require vessel owners to post a notice that informs employees of their right to complain about working conditions to the Coast Guard, OSHA, or the employer and to be free from retaliatory discrimination. OSHA has concluded that its exercise of authority under section 11(c) is not precluded by the scope of section 4(b)(1) of the OSH Act.

OSHA agrees to refer to the Coast Guard, for its consideration, any complaints, other than section 11(c) discrimination complaints, OSHA receives from seamen working aboard inspected vessels. However, the Coast Guard, consistent with the statement of its authority above, has the sole discretion to determine, under its applicable standards and regulations, whether the events complained of constitute hazardous conditions and the extent of any remedy that may be required.

Recordkeeping

OSHA and the Coast Guard will continue to discuss the extent of their respective jurisdictions to require owners of inspected vessels to keep records concerning occupational injuries and illnesses. This MOU does not resolve any issues concerning recordkeeping obligations.

Effective Date and Publication

This MOU shall take effect upon signature by the parties. It shall be promptly published in the Federal Register.

Dated: March 8, 1983.

James S. Garcey,
Comma[illegible]lant, United States Coast
Guard, Department of Transportation

Dated: March 4, 1983.

Thorne G. Auchter,
Assistant Secretary for Occupational
Safety and Health, Department of Labor

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60124

MALLARD BAY DRILLING, INC., PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

Petition for Review of an Order of the
Occupational Safety and Health Review Commission

[Filed: Aug 8, 2000]

ON PETITION FOR REHEARING EN BANC

Before: POLITZ and DAVIS, Circuit Judges, and RESTANI, Judge.*

PER CURIAM:

(3) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

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* Judge of the U.S. Court of International Trade, sitting by designation.

requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP.P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States Circuit Judge